In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1292

WILLIAM MICHAEL PARKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his plea of *nolo contendere* should not have barred him from appealing the trial court's denial of a pretrial suppression motion.

Petitioner pleaded *nolo contendere* in the United States District Court for the Southern District of Florida to one count of conspiring, in violation of 21 U.S.C. 963, to import marijuana in violation of 21 U.S.C. 952(a). He was sentenced to three years' imprisonment subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2), to be followed by a special parole term of two years. The court of appeals affirmed (Pet. App.).

The judgment of the court of appeals was entered on March 13, 1975. The petition for a writ of certiorari was not filed until April 14, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the case does not merit further review.

As set out by the court of appeals in its comprehensive opinion, the facts show that petitioner was a central figure in a conspiracy to import marijuana into the United States. In Miami, Florida, he arranged for Roy Warren to take him by boat to Jamaica; in Jamaica he was instrumental in procuring 1,130 pounds of marijuana (Pet. App. 9-10). The return trip was intercepted 35 miles from the Florida shore, however, when, acting pursuant to information received from Warren, who had contacted the Bureau of Narcotics and Dangerous Drugs ("BNDD") almost immediately after petitioner first approached him, BNDD agents from the Coast Guard cutter Dauntless boarded a boat being towed by Warren's boat, discovered the contraband, and arrested the four individuals aboard. The boats were then taken to Miami, and petitioner was discovered the following morning hiding on Warren's (Pet. App. 11-12).

Petitioner initially pleaded not guilty and filed motions to dismiss and to suppress the evidence. The motions were denied following a hearing held on April 19, 1973 (Pet. App. 12; Tr. I 11),[1] whereupon defense counsel began plea negotiations with the government. An agreement was reached whereby petitioner agreed to plead *nolo contendere* to the one count charged in the indictment and the government agreed to recommend a specific sentence of two years' imprisonment and to allow petitioner to preserve his right to appeal the court's ruling on the motion to suppress (Tr. I 4-7).

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[1]"Tr. I" refers to the transcript of the proceedings of April 23, 1973.

The district court, however, advised petitioner's counsel that it would not accept a *nolo contendere* plea unless petitioner was willing to waive all nonjurisdictional defects (Tr. I 17). Thereafter petitioner's counsel advised the court that he had discussed the situation with petitioner, and that petitioner wished to reassert his plea of *nolo contendere* despite the court's refusal to accept the appealability portion of the plea agreement (Tr. I 19-20). Throughout the remainder of the proceeding the court repeatedly reminded petitioner, personally and through his counsel, that a plea of *nolo contendere* acted as a waiver of all nonjurisdictional issues (Tr. I 28-29, 46-47, 58, 65, 68).

1. Petitioner did not raise in the court of appeals the issue of the appealability of nonjurisdictional issues following a plea of *nolo contendere* and accordingly this Court should not consider it. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2. In any event, petitioner's argument is unpersuasive.

It is well established that pleas of guilty or *nolo contendere* foreclose appeals of all nonjurisdictional defects, particularly alleged defects relating to the admissibility of evidence. *McMann* v. *Richardson*, 397 U.S. 759, 766; *United States* v. *Mizell*, 488 F.2d 97, 98-99 (C.A. 5) (and cases cited therein); *United States* v. *Sepe*, 474 F.2d 784, 788 (C.A. 5), affirmed *en banc*, 486 F.2d 1044; *United States* v. *Cox*, 464 F.2d 937, 940 (C.A. 6) (and cases cited therein). The reasons for the rule are sound. As the Sixth Circuit noted in its extensive treatment of the issue in *United States* v. *Cox, supra*, 464 F.2d at 942:

> There is a fundamental and basic inconsistency between knowingly and intelligently entering a voluntary plea of guilty, and then appealing from the judgment entered on the basis of that plea.

The court there also recognized that the contrary principle petitioner now asks this Court to establish "is at variance with the general, well-settled rule that a guilty plea 'normally rests on the defendant's own admission in open court that he has committed the acts with which he is charged,' see *McMann* v. *Richardson*, 397 U.S. 759, 766 * * *; *Brady* v. *United States*, 397 U.S. 742, 748, * * *; *McCarthy* v. *United States*, 394 U.S. 459, 466, * * *" (*id.* at 940). Furthermore, contrary to petitioner's contention (Pet. 10), allowing appeal of nonjurisdictional issues would not shrink the crowded dockets of the courts: since 90 percent of all criminal proceedings in the United States district courts are settled by pleas of guilty or *nole contendere*, see *Santobello* v. *New York*, 404 U.S. 257, 264, n. 2 (Douglas, J., concurring), it would instead further burden the federal courts of appeals.

Finally, as the Sixth Circuit noted in *Cox, supra*, 464 F.2d at 945, allowing appeals on nonjurisdictional issues following a plea of guilty is complicated by the lack of a record on which the reviewing court can determine the impact of the evidence admitted on the fact-finding process.[2] The courts of appeals would be forced either to speculate or to adopt a *per se* rule that the admission of the illegally gained evidence was prejudicial error.

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[2]Indeed, the trial judge in this case recognized the burden he would be placing upon the court of appeals if he sent the case to them without first meeting the issues "head-on to begin with" (Tr. I 22-23).

This case is particularly inappropriate for reviewing the general rule against appealability in light of petitioner's specific knowledge at the time of his plea that he would not be permitted to raise nonjurisdictional issues on appeal, and his waiver of all nonjurisdictional defects (Tr. I 17, 19-20, 28-29, 46-47, 58, 65, 68).

2. Petitioner also appears to contend that he is entitled to review of nonjurisdictional defects because of his agreement with the government reached during the plea negotiations. The record indicates, however, that petitioner's final plea was made only after the court advised him that it would not accept the portion of the agreement allowing appeal of nonjurisdictional issues (Tr. I 19-20). Petitioner cannot now insist that the terms of the agreement he voluntarily abandoned be enforced against the government.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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